IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 5TH JUNE 2007 / 15TH JYAISHTA 1929

WP(C).No. 3830 of 2005(E)

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AGAINST THE ORDER DATED 15/12/2004 IN IA.NO.478 /2004 IN OS.26/2004 of SUB COURT, MUVATTUPUZHA

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PETITIONER:

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THOMAS, S/O. JOHN, PANALICKAL HOUSE,
PIRAVOM KARA.

BY ADV. SMT.USHA RAVINDRAN

RESPONDENTS:

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1. P.S.DILEEPKUMAR, S/O. SASIDHARAN,
POOCHAKKATTIL, KAKKOOR KARA,
THIRUMARADY VILLAGE.

2. SASIDHARAN S/O. KOCHUKUTY,
NOW RESIDING AT POOCHAKKATTIL,
VETTIMOODU JUNCTION, PIRAMADOM
FROM KAKKOOR KARA, THIRUMARADY VILLAGE.

BY ADV. SRI.PAUL K.VARGHESE
SRI.G.KRISHNAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

TODAY ALSO WHEN THE CASE IS CALLED, THERE IS NO REPRESENTATION FOR THE PETITIONER. ACCORDINGLY, THE WRIT PETITION IS DISMISSED FOR DEFAULT.

5.6.2007 SD/- PIUS C.KURIAKOSE, JUDGE

/TRUE COPY/

**PIUS C. KURIAKOSE,J.**

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W.P.(C) No.3830 of 2005

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Dated: 20th November, 2007

**JUDGMENT**

In this Writ Petition under Article 227 of the Constitution, the petitioner impugns Ext.P3 order passed by the learned Subordinate Judge, Muvattupuzha in a claim petition under Order XXXVIII Rule 8 of the C.P.C. The learned Subordinate Judge entertained the claim petitioner and enquired into the same. The evidence consisted of Exts.A1 to A6 on the side of the claim petitioner and Exts.B1 to B3 on the side of the respondent-petitioner. After adjudication, the learned Subordinate Judge allowed the claim petition and lifted the order of attachment.

2. I have heard the submissions of Smt.Usha Ravindran, learned counsel for the petitioner, Mr.Paul K.Varghese, counsel for the 1st respondent and Mr.G.Krishna Kumar, counsel for the 2nd respondent.

3. Smt.Usha Ravindran submits that the claim petition was clearly not maintainable before the learned Subordinate Judge. The trial court had become functus officio on account of the passage of the decree. The execution court also did not have jurisdiction since no execution petition had been filed by the decree-holder for executing

the decree. The claim petition therefore should have been rejected as not maintainable.

4. I cannot agree. May be there is some merit in the submission of the learned counsel that the claim application on the original was not maintainable. But at the same time since the decree had not been executed and the property had not been sold, a claim petition under Order XXI Rule 58 was certainly maintainable. Significantly, in the claim petition both Rule 58 of Order XXI and Rule 8 of Order XXXVIII had been invoked. The Registry of the court registered it as I.A. on the original side. It appears that the contention regarding the maintainability was not raised before the learned Subordinate Judge by the present petitioner. The petitioner participated in the trial and produced Exts.B1 to B3 documents. The impugned order is one passed after adjudication. In terms of sub-rule (4) of Rule 58 of Order XXI C.P.C. read with Rule 8 of Order XXXVIII, Ext.P3 is to be treated as a decree for the purposes of the appeal. In other words, the petitioner has got appellate remedies on Ext.P3. The Writ Petition will stand dismissed. However the dismissal of this Writ Petition will not stand in the way of the petitioner pursuing appellate remedies against Ext.P3. If an appeal is preferred by the petitioner within three weeks

of receiving copy of this judgment, the court of appeal will exclude the time during which this Writ Petition was pending before this court and the time till the filing of the appeal from the reckoning for limitation, invoking Section 14 of the Limitation Act.

srd **PIUS C.KURIAKOSE, JUDGE**